MALAYAN BANKING BHD

v.

PUSAT MEMBELI BELAH PELANGI SDN BHD

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: C-02-1743-2010]
14 JUNE 2013

COMPANY LAW: *Charge - Registration - Company's properties charged as security - Failure to register charge within 30 days - Application for extension of time to register charge made more than ten years later - Whether there were reasonable and credible reasons for inordinate delay - Whether charge void - Companies Act 1965, ss. 114 & 180(1)*

LAND LAW: *Charge - Registration of charge - Purchase of shop lots - - Shop lots charged as security - Statutory obligation under s. 180(1) of Companies Act 1965 to register charge within 30 days after creation - Failure to register charge - Respondent had wound up - Request for title deeds of properties arising from agreement by respondent's liquidators - Application for extension of time to register charge made more than ten years later - Whether there were reasonable and credible reasons for inordinate delay - Whether charge void - Companies Act 1965, ss. 114 & 180(1)*

The respondent had entered into two sale and purchase agreements ('SPA') in 1997 to purchase 14 units of shop offices ('shop lots') from Majlis Daerah Temerloh and Ganda Bernas (M) Sdn Bhd. The respondent applied for loans from Mayban Finance Bhd to part finance the purchase of the shop lots and a loan agreement cum assignment ('loan agreement') was subsequently executed with the shop lots acting as security. However, the charge was not registered and the appellant came to know about it when it wanted to foreclose the properties after the respondent was wound up. The respondent's liquidators ('the liquidators') then requested that all title deeds of the properties arising from the SPA which were in the appellant's possession be given to them. The appellant only applied for an extension of time to

register the charge under s. 114 of the Companies Act 1965 ('the Act') in 2009 which was more than ten years after the charge was executed. In opposing the appellant's application, the liquidators argued that: (i) the appellant failed to provide reasonable and credible reasons for the inordinate delay; (ii) upon the winding up of the respondent, the rights of unsecured creditors to the assets of the company in liquidation had crystallised; and (iii) the appellant's application, if granted, would be prejudicial to the unsecured creditors and other shareholders of the respondent. The High Court dismissed the appellant's application due to inordinate delay and supervening events which took place since the creation of the charge. Hence, the present appeal.

Held (dismissing appeal with costs)
Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) Section 180(1) of the Act prescribed a statutory obligation to register a statement of the prescribed particulars of the charge with the Registrar of Companies within 30 days after the creation of the said charge. If this is not complied with, the charge shall, so far as any security on the company's property or undertaking thereby conferred, be void against the liquidator and any creditor of the company. It was the respondent's duty to register it but it did not do so. It was also open to the appellant to register it but it did not do so either. The result was that the charge was void unless time was extended under s. 114 of the Act. (para 2)

(2) The last date to lodge the statement of the prescribed particulars under s. 108(1) of the Act was on 6 January 1999 but this was not done. There was no satisfactory explanation for the delay in not applying for an extension of time after January 1999 and before the date of the winding up order in March 2003. There was also no explanation as to why the appellant waited until 2009 to apply for an extension of time when it became apparent that there was already a claim by the liquidators for the same properties as far back as 2003. (para 7)

(3) There was no satisfactory explanation for the High Court to satisfy itself before it could exercise its discretion in favour of the appellant. The appellant's application, if granted, would be

prejudicial to the creditors or shareholders of the respondent. It would be detrimental to the liquidators' claims to the titles in respect of the seven shop lots which were now in possession of the appellant and would deprive the liquidators of their accrued rights under s. 108 of the Act. (para 16)

(4) The loan agreement was between Mayban Finance Bhd and the respondent. The High Court Judge could not be faulted in holding that the appellant failed to show on what basis it was claiming interests on the shop lots assigned by the respondent to Mayban Finance Bhd. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memasuki dua perjanjian jual beli ('PJB') pada tahun 1997 untuk membeli 14 unit kedai pejabat ('lot-lot kedai') daripada Majlis Daerah Temerloh dan Ganda Bernas (M) Sdn Bhd. Responden memohon pinjaman-pinjaman daripada Mayban Finance Bhd untuk membiayai, secara separa, pembelian lot-lot kedai tersebut dan satu perjanjian pinjaman merangkap penyerahhakkan ('perjanjian pinjaman') seterusnya dimeterai yang mana lot-lot kedai tersebut dijadikan cagaran. Namun begitu, cagaran tersebut tidak didaftarkan dan perayu mendapat tahu mengenainya apabila ia berniat untuk merampas hartanah-hartanah tersebut selepas responden digulung. Pelikuidasi-pelikuidasi responden ('pelikuidasi-pelikuidasi') kemudiannya memohon agar kesemua surat-surat ikatan hak milik hasil PJB tersebut, yang berada dalam milikan perayu, diberikan kepada mereka. Perayu hanya memohon bagi lanjutan masa untuk mendaftarkan cagaran di bawah s. 114 Akta Syarikat 1965 ('Akta') pada tahun 2009, iaitu lebih daripada sepuluh tahun selepas cagaran tersebut dimeterai. Dalam menentang permohonan perayu, pelikuidasi-pelikuidasi menghujahkan bahawa (i) perayu gagal untuk memberikan alasan-alasan yang munasabah dan kredibel bagi kelewatan melampau tersebut; (ii) dengan penggulungan responden, hak-hak pemiutang-pemiutang tanpa sekuriti ke atas aset-aset syarikat yang telah dilikuidasi telah dikristalisasikan; dan (iii) permohonan perayu, jika dibenarkan, akan memudaratkan pemiutang-pemiutang tanpa sekuriti dan pemegang-pemegang syer responden yang lain. Mahkamah Tinggi menolak permohonan perayu atas kelewatan melampau dan peristiwa-peristiwa berselang yang berlaku sejak pembentukan cagaran. Oleh itu, rayuan ini.

A **Diputuskan (menolak rayuan dengan kos)**
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 180(1) Akta memperuntukkan kewajipan statutori untuk mendaftarkan butir-butir yang dinyatakan dalam cagaran dengan Pendaftar Syarikat dalam masa 30 hari pembentukan cagaran tersebut. Jika ini tidak dipatuhi, cagaran tersebut, setakat mana cagaran ke atas harta syarikat atau akujanji diberikan, adalah tidak sah terhadap pelikuidasi dan mana-mana pemiutang syarikat. Adalah menjadi kewajipan responden untuk mendaftarnya tetapi ia tidak berbuat demikian. Adalah juga terbuka kepada perayu untuk mendaftarnya tetapi ia tidak berbuat demikian. Akibatnya, cagaran tersebut tidak sah melainkan jika masa dilanjutkan di bawah s. 114 Akta.

(2) Tarikh akhir untuk membuat pernyataan butir-butir yang ditetapkan di bawah s. 108(1) Akta adalah pada 6 Januari 1999 tetapi ini tidak dilakukan. Tiada penjelasan yang memuaskan bagi kelewatan dalam memohon lanjutan masa selepas Januari 1999 dan sebelum tarikh perintah penggulungan pada Mac 2003. Tidak terdapat juga penjelasan tentang mengapa perayu menunggu sehingga tahun 2009 untuk memohon lanjutan masa sedangkan jelas bahawa sudah terdapat tuntutan oleh pelikuidasi-pelikuidasi bagi hartanah-hartanah seawal tahun 2003.

(3) Tiada penjelasan yang memuaskan bagi Mahkamah Tinggi untuk memuaskan hatinya sebelum ia boleh menggunakan budi bicaranya berpihak kepada perayu. Permohonan perayu, jika dibenarkan, akan memudaratkan pemiutang-pemiutang atau pemegang-pemegang saham responden. Ia akan menjejaskan tuntutan pelikuidasi-pelikuidasi ke atas hak milik bagi tujuh lot kedai yang kini dalam milikan perayu dan akan menafikan pelikuidasi-pelikuidasi akan hak-hak mereka yang terakru di bawah s. 108 Akta.

(4) Perjanjian pinjaman adalah antara Mayban Finance Bhd dan responden. Hakim Mahkamah Tinggi tidak boleh dipersalahkan dalam memutuskan bahawa perayu gagal untuk menunjukkan atas dasar apa ia menuntut kepentingan ke atas lot-lot kedai yang diserahhakkan oleh responden kepada Mayban Finance Bhd.

Case(s) referred to:
In re Ashpurton Estates Ltd [1983] 1 Ch 110 ***(refd)***
In re Resinoid v. Mica Products Ltd [1983] 1 Ch D 132 ***(refd)***
JJ Leonard Properties Pty Ltd v. Leonard (WA) Pty Ltd (in Liq) & Anor [1987] 5 ACLC 575 ***(refd)***
Morris v. Woodings [1997] 16 ACLC 47 ***(refd)***
Re Kris Cruisers Ltd [1948] 2 All ER 1105 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 108(1), 114, 233

Companies Act 1948 [UK], s. 101

For the appellant - Vignesh Kumar Krishnasamy (Syazlina Nadia Md Nasir with him); M/s Balendran Chong
For the respondent - Prakash Lachimanan; M/s Mathews Hun Lachimanan

[Editor's note: For the High Court judgment, please see Malayan Banking Bhd v. Pusat Membeli Belah Pelangi Sdn Bhd [2012] 10 CLJ 577.]

Reported by Najib Tamby

JUDGMENT

Abu Samah Nordin JCA:

[1] This is a case where the Kuantan High Court dismissed the appellant's application under s. 114 of the Companies Act 1965 ('the Act') for an extension of time to register a charge, namely loan agreement cum assignment dated 7 December 1998 executed by the respondent in favour of Mayban Finance Bhd, due to inordinate delay and supervening events which took place since the creation of the charge. The appellant filed its application, by way of an originating summons, on 8 June 2009. That was more than ten years after the charge was executed. On the face of it, it was a classic case of a long and inordinate delay, unless there was a reasonable and acceptable explanation for such inordinate delay.

[2] There is a statutory obligation under s. 108(1) of the Act to register a statement of the prescribed particulars of the charge with the registrar of companies within 30 days after the creation of the said charge. Section 108(1) of the Act makes it very clear that if this not complied with, "the charge shall, so far as any security on the company's property or undertaking's thereby conferred, be

A void against the liquidator and any creditor of the company". It was the duty of the company ie, the respondent to register it. It did not do it. It was open to the appellant to register it. But it did not do it either. The result is that the charge is void unless the time is extended under s. 114 of the Act (see *In re Resinoid v.* B *Mica Products Ltd* [1983] 1 Ch D 132 on s. 101 of the English Companies Act 1948, which is similar to our s. 114 of the 1965 Act).

[3] Briefly the facts are these. On 14 June 1997 the respondent C entered into two sale and purchase agreements to purchase 14 units of shop-offices ('shoplots') from Majlis Daerah Temerloh (the land proprietor) and Ganda Bernas (M) Sdn Bhd (the developer). The first SPA is for the purchase of 13 shoplots. The second SPA is for the purchase of another shoplot. It applied for D loans from Mayban Finance Bhd (not the appellant) to part finance the purchase of the shoplots. Upon approval of the said loan totalling RM4,400,000 Mayban Finance Bhd and the respondent executed the said loan agreement cum assignment ("loan agreement"). By cl. 4 of the loan agreement the respondent E absolutely assigns to Mayban Finance Bhd the said shoplots as security of the said loans.

[4] The appellant, in its affidavit in support of its application affirmed that it had instructed its previous solicitors, M/s Robert F Chung & Co to register the said charge. This was not done. It did not however disclose when it gave the instruction to its previous solicitors. It now claims that its previous solicitors had inadvertently omitted to register the said charge under s. 108 of the Act. There was no affidavit from the previous solicitors stating that the omission was due to inadvertence. G

[5] The appellant only knew that the charge was not registered when it wanted to foreclose the properties after the respondent was wound up by the court on 21 March 2003. The appellant did not however disclose when it actually came to know that the H respondent was wound up or when it decided to foreclosure the properties.

[6] There was however evidence to show that the appellant knew by April 2003 that the respondent was already wound up I when the respondent's liquidators wrote to the appellant on 11 April 2003, requesting that all title deeds of the properties arising from the sale and purchase agreements which were in

possession of the appellant be given to them, as liquidators. The liquidators claim the properties on the basis that they were entitled to take into their custody or under their control the respondent's assets pursuant to s. 233 of the Act.

[7] The last date to lodge the statement of the prescribed particulars under s. 108(1) of the Act was on 6 January 1999. It was not done. There was no satisfactory explanation for the delay in not applying for an extension of time after January 1999 and before the date of the winding up order in March 2003. There was also no explanation why the appellant waited until 2009 to apply for an extension of time when it became apparent that there was already a claim by the liquidators for the same properties as far back as 2003. What the appellant did was to write to the liquidators demanding that they register the charge when it could have done it on its own in 2003.

[8] An application for an extension of time to register the charge under s. 114 of the Act is not granted as a matter of course. It is granted at the discretion of the court upon it being satisfied that the omission to register the charge was:

(a) accidental;

(b) due to inadvertence;

(c) due to some other sufficient cause;

(d) not of a nature to prejudice the position of creditors or shareholders; or

(e) on other grounds that it is just and equitable to grant the relief.

(see also *In re Ashpurton Estate Ltd* [1983] 1 Ch 110 at p. 119)

The court may grant the extension of time to register the charge subject to such terms and conditions as it seems just and expedient, including a term or condition that the extension is to be without prejudice to any liability already incurred by the company or any of its officers in respect of the default.

[9] As stated earlier, the last date to register the statement of the prescribed particulars of the charge in Form 34 was on 6 January 1999. Several developments or supervening events had

taken place between 6 January 1999 and the date of this application for an extension of time to register the said charge. From the chronology of events prepared by their respective solicitors, it appeared that individual titles of the 14 shoplots had been issued on 14 December 1998. Seven out of these 14 shoplots had been redeemed by the respondent and subsequently sold to individual purchasers between 2001-2003. The sales took place before the respondent was wound up.

[10] On 30 April 2003, the titles to the other seven remaining shoplots had been given to the appellant for their retention (see M/s Ruhaizah & Wong Kian Chung's letter dated 30 April 2003 to the appellant).

[11] At the time of the execution of the loan agreement cum assignment, the master title for the land comprising, among others, the 14 shoplots, had not been subdivided. By the time the appellant applied to register the charge, individual titles to the 14 shoplots had been issued. Out of these 14 shoplots, seven shoplots had been sold to subsequent purchasers. Yet, the appellant's application for an extension of time to register the charge include the seven shoplots which had been redeemed by the respondent and sold to subsequent purchasers. The appellant's claim for the fourteen shoplots is further stated in para. 12 of the appellant's affidavit affirmed by Wan Rosmawati Wan Ibrahim, on 10 August 2009:

> Paragraph 12: "... Plaintiff adalah berhak sepenuhnya ke atas 14 bangunan rumah kedai tersebut yang telah pun diserahhak oleh defendan kepada plaintif ...".

Such assertion is baseless and ignores the fact that seven shoplots had been redeemed by the respondent.

[12] The liquidators had filed three affidavits opposing the appellant's application on the grounds that the appellant failed to provide reasonable and credible reasons for the inordinate delay in making this application despite of being aware of the liquidators claim to the said properties as far back as 2003 and it being in possession of the titles to the said properties since then. The appellant had not been vigilant in protecting and enforcing its rights. It is the liquidators' contention that upon the winding up of the respondent, the rights of unsecured creditors to the assets of the company in liquidation had crystallised.

[13] The liquidators had averred that several unsecured creditors had filed proof of debts with them. This include Public Bank Bhd, Hong Leong Bank Bhd and Summit Company (M) Sdn Bhd which claim the sums of RM21,715.20, RM690,075.35 and RM14,266.31, respectively against the respondent. The appellant's application, if granted, would be prejudicial to the unsecured creditors and other shareholders of the respondent.

[14] There are ample authorities that an application for an extension of time would not be granted once the company has gone into liquidation save only in exceptional circumstances: see *Jf Leonard Properties Pty Ltd v. Leonard (WA) Pty Ltd (in Liq) & Anor* [1987] 5 ACLC 575, *In re Resinoid & Mica Products Ltd, supra*, *Morris v. Woodings* [1997] 16 ACLC 47, *In re Ashpurton Estates Ltd* [1983] 1 Ch 110.

[15] Lord Brightman, in *In re Ashpurton Estate Ltd* at p. 123 said:

> Once the company has gone into liquidation, the existing unsecured creditors are interested in all the assets of the company, since the liquidator is bound by statute to distribute the net proceeds *pari passu* among the unsecured creditors, subject to preferential debts. The assets of the company are at that stage vested in the company for the benefit of its creditors. The unsecured creditors are in the nature of *cestuis que trust* with beneficial interests extending to all the company's property.
>
> If follows from this approach that the court must invariably refuse to extend the time for registration once the company has gone into liquidation. If an order extending time were made and the proviso included, registration would be of no assistance whatever to the unregistered charge because the unsecured creditors at that stage would be protected by the proviso. Such an order after liquidation would be futile and will be refused: see *In re Spiral Globe Ltd.* [1902] 1 Ch 396, where the order was made, though presumably useless to the unregistered chargee; *In re S. Abrahams & Sons Ltd* [1902] 1 Ch, 695, where the order was refused because it would be useless;

[16] Learned counsel for the appellant conceded that there was no explanation for the long and inordinate delay in making this application. The appellant knew in 2003 that the charge was not registered but for reasons only known to it, the application was only filed in 2009. Practice Note No. 3 of 1977 issued by the then chief justice had stressed the need to provide a satisfactory

explanation for the delay in making the application for an extension of time to register the charge. Vaisey J in *Re Kris Cruisers Ltd* [1948] 2 All ER 1105, in dealing with a similar application for an extension of time under s. 101 of the English Companies Act 1948 made the following observation:

> I think it is most important that the court should be fully informed of the circumstances which have given rise to the omission to register within the proper time and that the evidence, should not, as is so often the case, merely state that the matter was accidental and due to inadvertence without particularising the reasons for the breach of the statutory requirements and the surrounding circumstances. People seem to be under the impression that, on their merely saying that the omission was "due to inadvertence", the court is practically obliged to exercise the power, which I hold to be a discretionary power, under the Companies Act, 1948, s. 101.

In the instant appeal there was no satisfactory explanation for the High Court to satisfy itself before it could exercise its discretion in favour of the appellant. The appellant's application, if granted, would be prejudicial to the creditors or shareholders of the respondent. It would be detrimental to the liquidators' claims to the titles in respect of the seven shoplots which are now in possession of the appellant and would deprive the liquidators of their accrued right under s. 108 of the Act.

[17] It must be noted that the loan agreement cum assignment was between Mayban Finance Bhd and the respondent. The learned judge could not be faulted when she held that the appellant's affidavits in support failed to show on what basis it is claiming interests on the shoplots assigned by the respondent to Mayban Finance Bhd.

[18] For the reasons as aforesaid we agree with the decision of the learned judge in dismissing the appellant's application on like or substantially similar grounds. Hence, we dismissed the appeal by the appellant with costs of RM10,000 to the respondent.